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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

HONG KONG & SHANGHAI BANK, HONG KONG (TRUSTEE) LIMITED,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

ELEANOR PARRY and SABINA ZIGAL, also known as SABINA BITKER,
Real Parties in Interest.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division 3

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

The Hong Kong & Shanghai Bank, Hong Kong (Trustee) Limited, prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California,

First Appellate District, Division Three, entered in the above-entitled case on December 4, 1967.

OPINIONS BELOW

No formal opinion has been written in the above-entitled case. The orders of the Superior Court of the State of California, in and for the City and County of San Francisco, and of the Court of Appeal are printed in Appendix B hereto, *infra,* pp. ii-iii and p. iv, respectively.

JURISDICTION

The judgment of the Court of Appeal was entered on December 4, 1967 (R. 9; p. iv, *infra*). A timely petition for hearing before the California Supreme Court was denied on December 27, 1967 (R. 485). The order of the Supreme Court is printed in Appendix B hereto, *infra,* p. v. On March 16, 1968, this Court entered its order extending Petitioner's time within which to file its petition for writ of certiorari to and including May 1, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

After service of process was made upon its alleged agent in California, Petitioner filed a timely motion to quash such service (R. 14-15), specifying that it "has never done business in California" and thus was not subject to *in personam* jurisdiction (R. 12, 14). Under California Code of Civil Procedure Section 411(2), "doing business" as a ground for *in personam* jurisdiction is as broad as Federal due process will allow. *Cosper v. Smith & Wesson Arms Co.,* 53 Cal.2d 77, 346 P.2d 409 (1959).

After the California Superior Court denied its motion to quash service of process, Petitioner filed a timely petition

for writ of mandate in the California Court of Appeal (R. 1-278). In its petition for writ of mandate, Petitioner specified that subjecting it to *in personam* jurisdiction under the concept of "doing business" was inconsistent with "the due process clause of the United States Constitution" (R. 126).

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment to the Constitution of the United States permit the State of California to assert *in personam* jurisdiction over a Hong Kong Bank, which has never had an office in California, or a director, officer, employee or agent of any kind resident in California, simply because the Bank maintains bank accounts and trust funds in California?

The importance of this question to banks, not only throughout the United States but throughout the world, cannot be overemphasized.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States, printed in Appendix A hereto, *infra*, p. i. The statute involved is California Code of Civil Procedure Section 411 (2), printed in Appendix B hereto, *infra*, p. i.

STATEMENT

On January 2, 1962, plaintiffs Eleanor Parry and Sabina Zigal (also known as Sabina Bitker) and defendant Irene Zigal settled a prior California lawsuit, wherein plaintiffs asserted a claim to one-third of the estate of defendant's husband, then living and a party to that lawsuit. Defendant's husband died on January 3, 1962 (R. 44-45). Petitioner

administered the decedent's probate estate in Hong Kong (R. 22, 73). Defendant succeeded to the entire estate (R. 45).

In Hong Kong, on November 28, 1962, defendant established an inter vivos trust, naming herself beneficiary and Petitioner trustee (R. 413, 418). Since the creation of this trust, it has been administered exclusively in Hong Kong, and the corpus has never been located, even partially, in California. Indeed, prior to the ruling of the Superior Court, that corpus became subject to the *in rem* jurisdiction of the Hong Kong Supreme Court in an interpleader action filed by Petitioner on September 1, 1967 (R. 412-415).

On September 3, 1965, nearly three years after the probate of the decedent's estate and the creation of defendant's trust, plaintiffs filed the present action in the Superior Court (R. 27). Against defendant, they sought to set aside as fraudulent the settlement of the prior California action and to reassert a claim to one-third of the decedent's estate, now in the hands of defendant (R. 42-54). Against Petitioner, as if it were a stakeholder, plaintiffs sought to impose a constructive trust upon the assets which it held in Hong Kong on behalf of defendant (R. 45-46).

Petitioner is not involved in the fraud litigation between plaintiffs and defendant, and that controversy will proceed to final determination without any participation by Petitioner. However, Petitioner is not a mere stakeholder, but a trustee with a strict fiduciary duty to protect the corpus of the trust it holds.

On December 2, 1965, Petitioner moved to quash the service of process purportedly made upon it on the ground that it was not doing business in California within the meaning of Federal due process (R. 14-16).

The following facts are relevant to the issue of Petitioner's contact with California at the time of service of process:

Petitioner is a trustee company incorporated under the laws of Hong Kong. It maintains its offices in Hong Kong and has never had an office in California. It has never qualified to transact business in California and has never appointed an agent for service of process in California. It has never had a director, officer, employee, or agent of any kind resident in California (R. 16).

Petitioner is a subsidiary of The Hongkong and Shanghai Banking Corporation, also a Hong Kong corporation (R. 16), which does business in California through its subsidiary, The Hongkong and Shanghai Banking Corporation of California, a California corporation (R. 168-170).[1] In brochures available at its California office, the parent corporation lists these two subsidiaries as components of "The Hong Kong Bank Group" (R. 69-71, 75-84).

At the time of service of process, Petitioner had three types of deposit accounts with the California subsidiary: commercial savings accounts; time certificate accounts; and safe custody accounts for stocks, for which the normal service charge was assessed against Petitioner (R. 19-21). These accounts contained trust funds and were listed in Petitioner's name as trustee (R. 19-21, 179).

Petitioner solicited no trust business in California, and no trust administration was conducted for it by the California subsidiary (R. 181, 194, 219-223, 255, 259). In fact, the California subsidiary performs no services for Petitioner that it would not perform for any depositor, or for any correspondent bank in the transmission of funds (R. 150-152, 219, 228, 245-246, 254-255, 260-267).

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1. Both the Hongkong and Shanghai Banking Corporation and The Hongkong and Shanghai Banking Corporation of California have appeared generally in this action and have not questioned *in personam* jurisdiction.

All that is shown in the record is that at the time of service of process Petitioner had deposit accounts with a bank located in California. Based upon this insubstantial contact with the forum, a Hong Kong corporation has been compelled to enter California to protect the corpus of a trust which is tied to Hong Kong in every aspect save the personal appearance of the beneficiary before the California court.

Moreover, the rulings of the courts below seriously interfered with the power of the Hong Kong Supreme Court to effectively deal with the corpus of a trust over which it had *in rem* jurisdiction. Indeed, these rulings made Petitioner answerable to the California court at a time when it was subject to a final order of the Hong Kong Supreme Court regarding the disposition of the trust corpus (R. 455-456).

REASONS FOR GRANTING THE WRIT

1. The question presented is of major importance to all banking and trust institutions, both those located in the United States and those located in foreign countries. It is a common practice for all banks today to keep accounts of the type involved herein in many states in this country, indeed in all parts of the world.

Clearly, a holding that this activity, without more, subjects a bank to *in personam* jurisdiction for any cause of action wherever such accounts are found will have substantial impact upon the entire banking community. It is thus in the public interest that this Court develop some concrete guidelines in this area.

Without such development, there is the danger that statutes such as California Corporations Code Section 6451 (which subjects foreign lending institutions to *in personam*

jurisdiction if they have savings accounts in California) might be expanded from jurisdiction for causes of action related to such accounts to jurisdiction for *any* cause of action.

2. The orders of the courts below are not in accord with the decisions of this Court formulating the Federal due process test for *in personam* jurisdiction (*International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223 (1957); *Hanson v. Denkla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958)), as that test has been recently synthesized in the opinions of the Court of Appeals for the Ninth Circuit.

This synthesis can be stated as follows: there must occur within the forum at least one act which is related to the cause of action sued upon; and then, if such act is shown, the court must go on to decide if the assumption of jurisdiction accords with concepts of fair play and substantial justice. *T. D. Reeder Contractors of Ariz. v. Higgins Indus.*, 265 F.2d 768 (9th Cir. 1959); *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963); *Mechanical Contractors Ass'n. v. Mechanical Con. A. of N. Cal.*, 342 F.2d 393 (9th Cir. 1965); *Dragor Shipping Corp. v. Union Tank Car Co.*, 361 F.2d 43 (9th Cir. 1966); *Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967).

In making this synthesis, the court in the *Reeder* case recognized the opinion of this Court in *Perkins v. Benquet Consol. Mining Co.*, 342 U.S. 437, 72 S. Ct. 413, 96 L.Ed. 485 (1952), but expressly held that the *Perkins* case rested upon its own peculiar facts.

In the *Perkins* case, not only was the chief executive of the foreign corporation found physically within the forum, but during the cessation of that corporation's foreign activities, all corporate affairs were conducted in the forum.

In the instant case, the contact between Petitioner and California was insubstantial; and, under the Ninth Circuit test, if correct, jurisdiction cannot be assumed. Certainly, the contact in the instant case is far below that in the *Perkins* case.

The opinions of this Court support the validity of the Ninth Circuit test. In *McGee v. International Life Ins. Co., supra,* and *Travelers Health Ass'n. v. Commonwealth of Virginia,* 339 U.S. 643, 70 S. Ct. 927, 94 L.Ed. 1154 (1950), this Court upheld *in personam* jurisdiction where the contact with the forum was slight; however, the cause of action was related to that contact.

It is vital to the orderly and uniform development of the Federal due process test for *in personam* jurisdiction that this Court re-examine the *Perkins* case in light of the recent Ninth Circuit decisions.

The unsettled nature of the problem is underscored when the orders of the courts below are viewed in relation to *Fisher Governor Co. v. Superior Court,* 53 Cal.2d 222, 1 Cal. Rptr. 1 (1959), wherein the California Supreme Court acknowledged the approach of the *Reeder* case and the need for substantial contact when the cause of action is not related to that contact.

A re-evaluation of the *Perkins* case will necessarily afford this Court the opportunity to further develop *Hanson v. Denkla,* 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), wherein this Court held that the Delaware trustee of a Delaware trust was not subject to the jurisdiction of the Florida courts, even though the trustee remitted trust income to the settlor in Florida, and many claimants were located there.

This Court stated that "The record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the [trust] agreement as the solicitation in *McGee.*" (357 U.S., at 252.) If this Court was insisting upon a correspondence with the *McGee* case, then it was seeking to find an act related to the cause of action. No doubt, it is from this language that the Ninth Circuit approach has flowed. This Court should settle any dispute as to the meaning of the *Hanson* case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. ORRICK, JR.
Counsel for Petitioner

Dated: April 29, 1968